United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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6-12-69
(/)

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

586

No. 22171

[redacted]

MILTON CURETON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

On Remand from the United States Court of Appeals
for the District of Columbia

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February 11, 1969

405 F2d 239
2nd Cir

QUESTION PRESENTED ON REMAND

1. Was appellant aware of processes taking place, aware of his right and obligation to be present at his trial, and was he deliberately and voluntarily absent, without reason, to the extent that the court could proceed, over appellant's objection, with his trial "in absentia" without violating his right to confront the witnesses against him as guaranteed by the Sixth Amendment.

I N D E X

TABLE OF AUTHORITIES

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v.	)	No. 21,175
UNITED STATES OF AMERICA, Appellee	)	

Remand from the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR APPELLANT

Introductory Note

The record on appeal contains the transcript of the trial "in absentia" of the defendant on February 9, 13 and 14, 1967, and, on remand, the transcript of a hearing held on June 7, 1968. All references in this brief are to the transcript of the hearing, on remand, and are designated "Tr.II"

STATEMENT OF THE CASE

On April 18, 1968, the United States Court of Appeals remanded this case to the District Court for a hearing on the issue of whether the defendant, tried and convicted "in absentia", was absent deliberately, without a reason; was aware of his right and obligation to be present; and was aware of the processes taking place. The remand suggested the development of the circumstances in which appellant was taken into custody after the trial.

Appellant was convicted by a jury of housebreaking (22 D.C. Code § 1801), arson (22 D.C. Code § 401), and malicious destruction of personal property of a value in excess of $200.00 (22 D.C. Code § 403). The charges grew out of a single episode in a rented house where appellant's estranged wife lived with her mother and step-father; members of the household were then absent. He was sentenced to three to ten years' imprisonment on each of the three counts, the sentences to run concurrently with each other but to take effect at the expiration of another sentence.

Appellant's principal contention on appeal was that the trial "in absentia" violated defendant's right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment.

The appeal record was insufficient to determine if the defendant's absence was clearly voluntary and a deliberate failure to appear without reason, and to determine if defendant was aware of the processes taking place and of his right and obligation to be present.

Finally, "should the court as a result of the remand in this case decide the trial should not have continued, the judgment will be set aside, otherwise it will remain in effect, subject to such rights of appeal as may then appertain."

On remand, a hearing was held on June 7, 1968, to develop the facts of appellant's absence and his subsequent apprehension after the trial.

The trial judge, on Thursday, after a jury was impaneled in the presence of the accused, respited the trial until the following Monday. On Monday the court reconvened but appellant, at liberty on his personal

recognizance, was absent. The court issued a bench warrant, and recessed for a few hours; appellant's counsel opposed a trial "in absentia".

Prior to adjournment Thursday, the court instructed the jury, "Be here on Monday morning at a quarter of ten in the jury room right in back of this courtroom so we can commence the trial promptly at 10:00 o'clock on Monday. * * * " Appellant was present when this instruction was made to the jury, but has no recollection of it. (Tr.II 8).

Mr. Robertson, court appointed counsel, questioned appellant as follows:

Q. Monday, February 12, did you come to this courtroom?

A. I came to the court, to the witness room.

Q. In this building?

A. Yes, I did.

Q. What room was that?

A. I think it is 1335, but I can't be sure of the number.

Q. Did you stay in the witness room?

A. Yes, I did.

Q. Did you come down here on the next day, Tuesday?

A. Yes, I did.

Q. Where did you go then?

A. The same room. (Tr.II 8-9)

The appellant testified that the witness room referred to above was the same room from which he came when his trial commenced on Thursday, and that, if he again saw the marshall who was present in the witness room, he could identify him. (Tr.II 13).

The appellant testified that he reported to No. 2 Precinct, under the conditions of his personal recognizance, on Friday and Saturday while his trial was adjourned. (Tr. II, 11). Appellant's brother corroborates this. (Tr. II 36-7).

From the time of his trial "in absentia" until he was apprehended, in the District of Columbia on April 22, 1967, the appellant went to the address of his grandmother and his mother every day or every other day. (Tr. II, 14). However, during this same period of time, he lived with his brother, with the knowledge of court appointed counsel. (Tr. II 26,27).

Appellant's brother lived at 924 M Street, N.W. about a block from the residence of appellant's grandmother and mother, 1021 8th Street, N.W. (Tr. II 10, 30).

Joseph John Cureton, brother of the appellant, corroberated that appellant lived with him at 924 M Street N.W., from February 9, 1967, until appellant was apprehended in April, and that appellant worked for the United Trash Company during this time. (Tr.II 36-39, 41-3).

Mrs. Elliott, grandmother of appellant, knew that appellant was living with his brother from February to April, 1967. (Tr. II 45-47).

Mrs. Line Elliott (appellant's mother, who lived with his grandmother) was the person whom appellant was to contact under the provisions of his personal recognizance. (Tr. II 14,26). However, she was never called as witness nor is there any evidence t hat she was contacted for information on the whereabouts of the absent appellant.

Appellant and his brother went to No. 2 Precinct after the trial without discovering the existence of a bench warrant.(Tr.II, 11-12,40-4 Appellant lost his identification and was unable to check in at the Precinct without it. (Tr. II 12, 40-41).

Under cross examination by Mr. Titus, U. S. Attorney, appellant denied that he was fully aware of the processes taking place. (Tr.II 2, 32). Appellant had always been in custody, as a juvenile, when he was a defendant in previous trials. (Tr. II 33-34). Again, on redirect examination the appellant denied that he was aware of the processes taking place, but conceded that he was advised of the right to confront witnesses. (Tr. II 62).

Mr. Ellis G. Dooley, Jr., Supervisor U. S. Marshall's Office, Warrant Squad Division, obtained a description and the address of appellant from Mr. Robertson, court appointed counsel. (Tr. II 51). Mr. Dooley did not go personally to the witness room on Monday, February 13th, in search of the absent appellant, but made inquiry by telephone. (Tr. II 56,59). Then, Mr. Dooley in company with another deputy went to the residence of appellant's grandmother; Mrs. Suller (apparently a roomer) answered the door but she knew nothing about the appellant. (Tr. II 51). On the evening of February 13th (or morning of February 14th) Mr. Dooley located appellant's grandmother at her home but she did not know the whereabouts of appellant. (Tr. II 51-53). Subsequently, Mr. Dooley placed a "stop" with the Metropolitan Police and the FBI which recorded that there

was a warrant and a charge; this "stop" information was not relayed to the precinct level. (Tr. II 53-54). The record does not reveal any further effort to execute the bench warrant prior to appellant's apprehension in April, 1967, on another charge.

Mr. Robertson, court appointed counsel for appellant, gave the only instruction about attendance, after the adjournment on Thursday, and he described this as follows:

> That is that my recollection is clear that Friday I told him to be - - that I would see him here Monday morning. (Tr. II 24).

A memorandum filed by the judge of the trial court, dated June 26, 1968, page 2, states:

> Although the court did not instruct the defendant to be present in the courtroom on Monday, the trial transcript (Tr. 33) makes it unequivocally clear that his attorney admonished him to be there.

This memorandum, page 4, concludes that appellant's testimony as to his presence in the witness room on Monday and Tuesday, February 13th and 14th was obviously self serving.

ARGUMENT

The decision in this case of the United States Court of Appeals for the District of Columbia, dated April 18th, 1968, discusses the authorities, the rules and the interpretations thereof which lead to this remand.

Rule 43, Fed. R. Crim. P., was the basis for continuing the trial after the court concluded that the defendant's absence was voluntary. The rule is designed to prevent a defendant, in other than capital cases, from defeating the proceedings by voluntarily absenting himself from a trial commenced in his presence. Diaz v. U.S., 223 U.S. 442. The Rule confers latitude on the court in deciding whether to proceed or to declare a mistrial. The appellant did not waive his right to be present because his counsel objected to the continuation of the trial in his absence. See U.S. v. Vossale, 52 F. (2d) 699 (1431).

The decision of the United States Court of Appeals in this case establishes the tests to determine if a defendant's absence is voluntary, page 8:

> In the above circumstances, taking into consideration the right, the obligation, and that the orderly administration of justice takes account on the one hand of the importance of a defendant's presence and, on the other hand, the need for control of the situation by the court, we conclude that if a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away. Parker v. United States, 184 F. 2d 488 (4th Cir.). Our language in Cross to the effect that he cannot frustrate a trial in progress by absconding indicates the sort of situation which enables the court to continue the trial. See, also, Falk v. United States, supra at 454; United States v. Vassalo, 52 F.2d 699; United States v. Noble, 294 Fed. 689. (Underlining

On Page 9:

> It is not clear that appellant's absence was a deliberate failure to appear without a reason which might bear upon the court's latitude to have continued the trial or not, or which might lead the court to find his absence was not voluntary when that term is given the content we have indicated: it is not clear,in sum, that in all the circumstances there was an absconding or the like, though there might have been.
>
> * * * * * *
>
> It would go a long way to avoid uncertainty in such cases were the trial court at the time of sentencing to explore the reason the defendant was absent. As we have seen Rule 43 permits a trial which has commenced in defendant's presence to be continued in the event of his voluntary absence "to and including the return of the verdict."

And Footnote 9, page 9:

> We suggest the advisability of trial transcripts noting the presence or absence of defendant, and that when a trial is recessed to be resumed the defendant on the record should be given directions as to his appearance.

Appellant suggests that none of the standards prescribed by the Court of Appeals have been met which could justify the trial court to proceed "in absentia". His absence was neither deliberate nor without reason - he was in the same witness room he occupied when his trial commenced; this is not inconsistent with his counsel's statement: "I told him to be - that I would see him here Monday morning." The expression <u>see him here</u> is uncertain as to exact location and does not negate the appellant's interpretation as the witness room.

The search for appellant on Monday, February 14th, was not diligent; the U. S. Marshall checked the witness room only by telephone and appellant's counsel said only that he did not see appellant in the witness room. This does not preclude appellant from being present without being seen. There is no indication in the record that appellant was paged in the witness room.

Appellant never left the jurisdiction, or absconded. After his last day in the witness room (Tuesday, February 14th); he lived with his brother and worked with him, always in the District of Columbia, until he was apprehended on another charge about April 22nd. He was unaware of an outstanding warrant because No. 2 Precinct had no knowledge of it when he checked with them. Further, he was unable to check in with the Precinct because of lost identification.

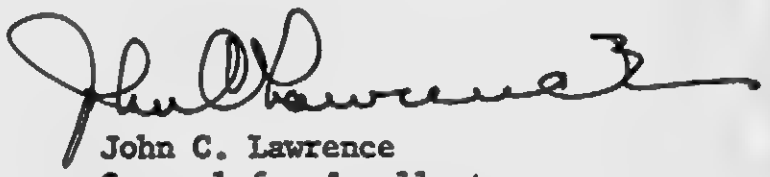
Appellant was not aware of the processes nor was he instructed by the court as to his rights and obligations to be present at his trial.

Appellant was educated through the eighth grade; his level of intelligence may have contributed to his misunderstanding of the precise location for him to appear when his trial resumed on Monday, February 14th. Assuming this to be correct, how can the court officials deny their level of diligence in searching for him was deficient also.

No one questions the requirement of instructing the appellant on his right and obligation to be present at his trial, but the court did not so instruct.

CONCLUSION

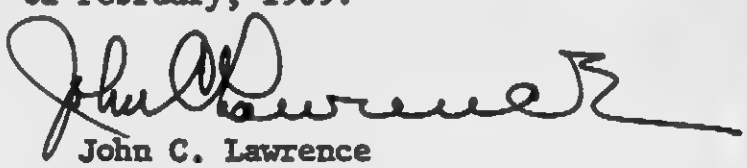
WHEREFORE it is respectfully submitted that the judgment of the District Court be reversed and remanded for new trial or such other relief that this Court deems just and proper.



John C. Lawrence
Counsel for Appellant
(Appointed by the United
States Court of Appeals)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for appellant has been served, by mail, on Frank Q. Nebeker, Esquire, Office of the United States Attorney, United States Courthouse, Washington, D.C. 20001, this 11th day of February, 1969.



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,171

MILTON CURETON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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Assistant United States Attorneys.

Cr. 1055-66

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ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the District Court erred in ordering that the judgment of conviction should remain in effect, having concluded upon the record that appellant voluntarily absented himself from the latter portions of the trial even though he was aware of the processes taking place; he knew of his right and of his obligation to be present; and he had no sound reason for remaining away from the trial.

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* This case was before this Court previously as No. 21,175 and was the subject of an opinion rendered April 18, 1968, *Cureton* v. *United States*, —— U.S. App. D.C. ——, 396 F.2d 671 (1968).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,171

MILTON CURETON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Summary of Proceedings

This is an appeal from a determination by United States District Court Judge Joseph C. McGarraghy,[1] ordering appellant's previous judgment of conviction for housebreaking (22 D.C. Code § 1801), arson (22 D.C. Code § 401) and malicious destruction of personal property of a value in excess of $200.00 (22 D.C. Code § 403),

[1] Memorandum Opinion by Judge McGarraghy filed June 26, 1968, hereinafter referred to by the designation "M" followed by the pertinent page number.

for which he was sentenced from three to ten years on each count, concurrently, to remain in effect. That determination was reached following a hearing pursuant to a mandate from this Court [2] to determine whether the trial court properly continued with the trial of the case, which had begun in appellant's presence but had been concluded in appellant's absence.

Summary of Hearing on Mandate

Since the facts of this case were previously briefed and argued and are reflected in this Court's opinion,[3] we deal only with the facts as developed in the Hearing [4] held on June 7, 1968 before the trial court pursuant to this Court's mandate. That hearing was for the sole purpose of determining whether the appellant's absence from court was voluntary. Appellant had previously been present at the trial, through the impaneling of the jury on Thursday, February 9, 1967, but did not appear at all thereafter when the trial resumed February 13 and when a guilty verdict was returned February 14, 1967. (He was present at sentencing on June 16, 1967.)

At the Hearing on the *absentia* issue, appellant testified that while he acknowledged being present during the initial trial proceedings on that Thursday, he did not recall hearing the court adjourn the trial until Monday morning, and admonish the jury at that time:

> "Be here on Monday morning at a quarter of ten in the juryroom right in back of this courtroom so that we can commence the trial promptly at 10:00 on Monday. * * * You be here at a quarter of ten Monday morning." [5]

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[2] *(Milton) Cureton* v. *United States*, D.C. Cir. No. 21,175, decided April 18, 1968, —— U.S. App. D.C. ——, 396 F.2d 671 (1968).

[3] —— U.S. App. D.C. ——, 396 F.2d 671 (1968).

[4] For the convenience of the court, we adopt designations made by appellant and refer to pages from the trial transcript hereafter as Tr. and to the transcript of the District Court Hearing on Mandate of this Court as Tr. II.

[5] Tr. 25(b)-25(c); Tr. II 7-8.

In the course of the remarks to the jury in open court, the word "Monday" was repeated seven times by the court.[6]

Furthermore, the record of the hearing on remand makes it clear that appellant's trial counsel was certain that he told appellant to report on Monday morning. Counsel stated on the record when the trial was about to resume and the appellant did not appear, that "my recollection is clear that Friday I told him to be—that I would see him here Monday morning."

> THE COURT: You don't mean Friday; you mean Thursday. Thursday was the last day we were in court.
>
> MR. ROBERTSON [defense counsel]: Thursday. And I also cautioned him to be sure to report to the police precinct each day.[7]

In addition to the above, which was read into the record at the hearing, appellant's trial counsel answered additional questions posed by the court below as follows:

> "THE COURT: Mr. Robertson, is there any question about it that you advised me on the day in question that you had instructed this defendant to report to you that morning?
>
> MR. ROBERTSON: None whatever.
>
> THE COURT: And did you so advise him?
>
> MR. ROBERTSON: I did, Your Honor.
>
> THE COURT: All right."[8]

Further, immediately before the commencement of the trial in appellant's absence, the court had inquired:

> "As I recall it, I think the record is that you admonished the defendant. You, as his counsel, admonished the defendant on Thursday to be here in court this morning. That is a correct statement, is it not?

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[6] It is true as this Court pointed out, that "no remarks were addressed directly to appellant" by the court (*Cureton, supra,* 396 F.2d at 676) but presumably they were made within his hearing.

[7] Tr. 33; Tr. II 24.

[8] Tr. II 24.

MR. ROBERTSON: That is correct, Your Honor." [9]

We respectfully submit that the expanded record now before this Court does not reveal that appellant's "counsel seemed uncertain of his advice to appellant about appearing on Monday." [10] Rather, the court below concluded upon remand from this Court that it is "unequivocally clear that his attorney admonished him to be there." (M 2).

Appellant's contention at the hearing below was not that he was unaware of the necessity to report for trial on that Monday, but that he reported to the wrong place. He testified at the hearing that he had reported on Monday, February 12 (actually the date would have been the 13th) to the witness room of the Court House, which he thought was Room 1335, and again reported there on Tuesday, the last day of the trial, but did not report Wednesday (Tr. II 8-10). As the trial court pointed out in its findings:

> "It is noteworthy that he testified that he presented himself in the witness room during the days his trial was proceeding, but with some form of clairvoyance he failed to appear on Wednesday when his trial was completed and did not thereafter appear." (M 2)

Appellant's own trial counsel related to the court at the trial his efforts to locate appellant that morning:

> "I thereafter checked in the courtroom of Chief Judge Curran. He was not there. I went to the witness room in the assignment office. He was not there." (Tr. 33, Tr. II 23).

He also attempted to call appellant at his grandmother's house, with no success (Tr. 32-33, Tr. II 23-24). Deputy United States Marshal Ellis Dooley also testified that on February 13 he had checked with a Deputy in the witness room in which appellant claimed to have waited, and

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[9] Tr. 45.

[10] *Cureton, supra,* 396 F.2d at 676.

found that appellant had not been present in the room on that day (Tr. II 56-59). Both trial counsel and the Marshal tried to locate appellant until court reconvened at 1:45 p.m. to no avail (Tr. 38). Thus, the trial court implied its disbelief of appellant:

> "His statement as to his presence in the witness room is obviously self-serving." (M 4).

Appellant admitted that he did not comply with the terms of his release on personal recognizance at the time of his trial, for he said he resided with his brother at 924 M Street, Northwest, whereas the terms of his release called for him to live at his grandmother's house at 1021 Eighth Street (Tr. II 10, 30). He claimed that he stopped in at his grandmother's about every other day, from the time of the trial until he was finally apprehended on another charge on April 22, 1967 (Tr. II 14, 16).

According to the terms of his release, he was also supposed to report daily to the local Metropolitan Police Precinct Number Two, and he testified at the hearing that he reported on the Thursday that the trial began, and again on Friday and Saturday of that week, but only once after that, because he stated that he had lost his identification and the officers at the Second Precinct would not let him register there, absent proof of identification (Tr. II 11, 12). Officer Smallwood of the Second Precinct indicated on Monday the 13th of February that appellant had not reported at all over the weekend, since that Friday the 10th. (Tr. 31). Appellant claimed he specifically asked the officers at the Second Precinct whether there was a warrant outstanding against him, and asserted that they told him no (Tr. II 12), even though the Deputy Marshal later testified that a "stop" was issued to both the Federal Bureau of Investigation and the Metropolitan Police to hold appellant pursuant to the Bench Warrant issued on February 13, 1967 (Tr. II 53-54).

Appellant's own testimony at the hearing revealed that following his appearance in court on the first day of trial, he made no attempt to contact his trial counsel to ask about the outcome of the trial, even though he knew that

he was on trial for criminal charges, and had been on trial for other offenses previously (Tr. II 20, 21, 24, 29, 31, 34). Appellant admitted, after extensive cross-examination, that he never called his lawyer to tell him he had moved from his grandmother's house where the attorney had tried to reach him.[11] He also claimed that with the

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[11] Contrary to the assertion in appellant's brief, p. 4, that appellant lived with his brother from February until his apprehension in April, *"with the knowledge of court appointed counsel"*, the transcript reveals otherwise: (Cross-examination of appellant by Assistant United States Attorney); (Emphasis added).

"Q. Since you knew that you were not living where you told the court you would be living, didn't that make it mandatory for you to call your lawyer, who was in his office both these days, and let him know?" (Tr. II 26-27)

"A. No. I didn't, because I usually stopped by there every day.

Q. You what?

A. I usually stopped by.

Q. It is not what you usually do. Did you stop by and tell your lawyer you had changed your address on Friday, Saturday and Sunday?

A. I told him I was living with my brother.

Q. When did you tell him that?

A. *I think I told him on the telephone.*

Q. When did you tell him that, sir?

A. I don't know. When I got out.

Q. When you got what?

A. When I went out. Because my mother had rented the room out."

* * * *

"Q. * * * After this trial had started, * * * when his Honor recessed the trial and your attorney advised you to be back here, meaning the courtroom, on Monday, from that day until the following Monday did you go back and live at the place you were supposed to?

A. No, I didn't.

Q. *Did you call your attorney and tell him that you were not living at the place you were supposed to?*

A. *No, I didn't.*

Q. Why?

A. Why?

Q. It is a simple question. Why?

A. Because my attorney—*I called my attorney.* That is all. We kept contact as much as we could." (Tr. II 27-28)

* * * *

[Footnote continued on page 7]

loss of his identification papers and wallet, he lost his attorney's phone number and therefore could not call him to inform him of his whereabouts (Tr. II 30). He acknowledged that he knew where to find telephone directories, but failed to look up the attorney's number (Tr. II 31).

Finally it is noteworthy that at the close of cross-examination, appellant answered the Assistant United States Attorney's questions in a manner which at least implies a lack of good faith on his part, since he previously indicated he was not aware he had to be at the trial on that Monday. He was questioned as follows:

> "Q. You knew you had to be here?
> A. Yes.
> Q. And you didn't show up?
> A. No Sir." (Tr. II 34)

Appellant never reported voluntarily or made any positive attempts to inform anyone representing the court or

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[11] [Continued]

"Q. * * * Between the Thursday that that trial began and the following Monday when you were supposed to be back here in court to continue the trial which you knew was then in progress, *did you call your lawyer* and tell him that you had changed your address in the address you had on your personal recognizance?

A. *I don't know whether I told him or not.*

Q. *Are you telling us you talked to your attorney between that Thursday and the following Monday? Are you telling that to the court under oath?*

* * * from the time the trial began * * * till the following Monday when you were due to report back—

A. *No, I didn't.*

Q. *Did you call your lawyer?*

A. *No.*

Q. Why?

A. I thought he would contact me when the trial was supposed to go ahead.

Q. Where was he going to contact you?

A. At my grandmother's. That is where he had called previously." (Tr. II 28-30)

Thus the record reveals that he never informed his counsel of his change in address, and this adds to the contention that appellant deliberately was absent from the trial.

law enforcement of his whereabouts for the next few months, and he was apprehended on April 22, 1967 on an unrelated charge of assault, for which he was given a sentence of six months. (Tr. II 15-16.) The Deputy Marshal later testified that appellant was arrested pursuant to the bench warrant on April 24, 1967 when it was discovered that he was in the custody of the D. C. Jail for the above offense (Tr. II 54-56).

Appellant's brother, Joseph Cureton, testified by way of corroboration of appellant's allegations that he had reported to the Second Precinct Police Station, and that appellant had been working along with his brother as a trash collector for United Trash Company. He also substantiated that appellant resided with him at his home during the period alleged by him. However, his testimony lent no specific corroboration to appellant's claim that he reported to the Court House Witness Room on the two days during which the trial took place in his absence. (Tr. II 34-41.)

Similarly, the testimony of Mrs. Martha Elliot, appellant's grandmother, did not add anything to appellant's argument, for at best she indicated that he did not reside with her as he was supposed to under the terms of his release on personal recognizance, but rather he merely visited her and lived with his brother during the period in question (Tr. II 46-47).

As indicated previously, Deputy United States Marshal Dooley was also a witness at the hearing. In addition to checking the Court House on the 13th of February for the whereabouts of appellant, Dooley investigated the premises at 1021 Eighth Street, Northwest, where appellant was supposed to be staying with his grandmother. He interviewed a woman who was apparently a roomer there, but she told him she knew nothing about appellant (Tr. II 51). The next day the Marshal spoke with appellant's grandmother, Mrs. Elliot, who told him she had not seen appellant for a couple days and she indicated that she did not know where or with whom he was staying (Tr. II 51-52). The Marshal received no further in-

formation about appellant's whereabouts until he learned appellant was in D. C. Jail on April 24, 1967 (Tr. II 56).

Based upon the evidence adduced at the Hearing and the transcript of the trial proceedings, the District Court Judge made certain findings of fact and drew certain conclusions. The opinion of the trial court states unequivocally its finding that "[appellant's] claim that he was present in the witness room waiting to be called was refuted not only by the Deputy Marshal's testimony but also by his own attorney. A diligent search of the Court House was conducted and he could not be found. An inquiry made at the address which was on his personal recognizance release form proved to be futile, since he was not living there at the time." (M 6).

The court continued:

> "The defendant was familiar with our judicial system. He had been tried previously for a felony offense. [See Tr. II 2-21] His actions at the time of the trial indicate to this Court that he voluntarily absented himself." (M 6).

Furthermore, the court found: (M 7)

> "The record in this case conclusively establishes that the defendant knowingly and voluntarily absented himself from the courtroom during the trial which he knew was in process; that he failed to comply with the instructions of his lawyer and failed to communicate with his lawyer at any time following the recess on the first day of the trial; that he made it impossible for his lawyer or other authorities to communicate with him by living at an address other than the one which he had furnished at the time of his release on personal recognizance and where he was required to live as one of the conditions of his release, thus being in violation of the terms of his release; that he failed to communicate with the police precinct as he was required to do, and that this absence and these violations of the conditions of his release continued over a period of more than two months during which he could not be located and that his apprehension was finally accomplished when

> he was arrested on a charge of assault for which he was subsequently charged, tried and convicted. It was after this apprehension that it finally became possible for the court to impose sentence. (M 7)

Thereupon the court concluded that "the defendant's absence was voluntary, that he was aware of the processes taking place, that he knew of his right and of his obligation to be present, and that he had no sound reason for remaining away." (M 8). The court ordered that the judgment of conviction should remain in effect. This appeal is taken from that determination.

ARGUMENT

The District Court did not err in ordering that the judgment of conviction should remain in effect, having concluded upon the record that appellant voluntarily absented himself from the latter portions of the trial even though he was aware of the processes taking place; he knew of his right and of his obligation to be present; and he had no sound reason for remaining away from the trial.

(Tr. II 20-21, 33-34, 62)

The findings and conclusions of the District Court have been set out in detail in the Counterstatement of the Case, *supra*, and therefore will not be repeated here. The applicable law in this case is clearly set forth in this Court's prior opinion.[12] We submit that the District Court properly applied the law set forth by this Court to the facts as it found them from the hearing.

This Court has ruled that "* * * if a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." [13]

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[12] *Cureton, supra*, 396 F.2d 671.

[13] *Id.* at 676, *See* also, *e.g.*, *Diaz* v. *United States*, 223 U.S. 442, 445 (1912); Rule 43, *Fed. R. Crim. P.*

We submit that the findings of fact by the trial court concerning the voluntariness of appellant's absence from the trial cannot be set aside on this appeal unless "clearly erroneous", and only after having given due regard to the opportunity of the trial court to judge the credibility of the witnesses.[14]

We think that there was substantial evidence in the record as a whole to support the findings of the trial court in this regard.

Appellant produced no sound reason for his remaining away from the trial,[15] because his evidence is to the effect that he was present in the Witness Room on both days of the trial, waiting to be called. The trial court found otherwise, based upon testimony by appellant's own trial counsel, and by the Deputy United States Marshall, which directly contradicted appellant's assertion, as both men testified that a thorough search was made of the witness room and appellant was not there on the day the trial resumed. The issue was solely one of credibility to be left to the trier of fact and not to be disturbed on appeal.[16]

Furthermore, there can be little question of appellant's awareness of the processes taking place and of his right and obligation to be present.[17] Clearly he knew he should be present if he asserts that he, in fact, went to the Witness Room. But, apart from that, the record supports the trial court's finding. Not only was he present when the Court told the jury to return on Monday, but his own counsel told him to report for the remainder of the trial. In addition, even though appellant denied that he knew anything about the law or his rights, he did acknowledge that his counsel advised him prior to the trial of his right

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[14] *See:* Rule 52(a) *Fed. R. Civ. P.; Jackson* v. *United States,* 122 U.S. App. D.C. 324, 326-7, 353 F.2d 862, 864-5 (1965); *Green* v. *United States,* 128 U.S. App. D.C. 408, 411, 389 F.2d 949, 952, N.2 (1967).

[15] Compare: *Parker* v. *United States,* 184 F.2d 488 (4th Cir. 1950).

[16] See note 14, *supra.*

[17] *Cureton, supra,* 396 F.2d at 676.

of confrontation of witnesses. (Tr. II 62). Appellant admitted he had been in court previously for other charges, one of which was a felony. (Tr. II 20, 21). He knew that he was on trial here for criminal charges. (Tr. II 21, 20). He knew that he could not come and go as he pleased, and that he had an obligation to be at the trial.[18]

Finally, appellant's contention that he remained in the witness room for the two days of the trial is incredible in light of all of the surrounding circumstances revealed by the evidence at trial and at the hearing, leaving aside the direct contradictory evidence of the Marshall and appellant's trial counsel. The trial court noted the strange clairvoyance displayed by appellant who somehow knew, if his story is to be believed, that he should remain Monday and Tuesday, but on the day his trial was over he left, not to return. He maintains he did not know anything of the continuation of the trial and yet was present in the Courthouse. When he was allegedly not called on two successive days, he made no attempt to contact his attorney or the Court, to find out the status of his trial; he made no attempt to even let his attorney know that he had moved, so that he could be contacted; and furthermore, he was in deliberate violation of the terms of his release, according to facts revealed in his own testimony and that of his witnesses. The fact that he made no attempt over the next two months to notify the police of his whereabouts, even though he was obliged so to do, under the terms of his personal recognizance, is further

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[18] At the hearing, he was questioned on cross-examination as follows:

"Q. * * * Are you telling the Court since you were out on personal recognizance that you believed you had a right to just come or go during your trial as you saw fit?

A. No, I didn't.

Q. No, you didn't what?

A. I just answered the question. You asked did I have a right to come and go as I want and the answer was, no.

Q. You knew you had to be here?

A. Yes.

Q. And you didn't show up?

A. No, sir." (Tr. II 33-34).

evidence of bad faith, illustrating that appellant deliberately and knowingly absented himself from the courtroom, and would not have returned to court at all but for the fact that he was arrested on another charge, and then later arrested at the jail on a bench warrant issued by the trial court in this case.

Based upon all of the evidence before it, the District Court's conclusion that appellant's absence from the trial was voluntary can not be said to be "clearly erroneous", and therefore there was no error in the order of that court permitting the judgment of conviction to remain in effect.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the judgment of the District Court should be affirmed.

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